

September 23, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Scott Wenger

Date of Filing: September 9, 2009

Case Number: TFA-0328

On September 9, 2009, Scott Wenger (Appellant) filed an Appeal from a determination issued to him on August 4, 2009, by the Idaho Operations Office (Idaho) of the Department of Energy (DOE). In that determination, Idaho responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. This Appeal, if granted, would require Idaho to conduct a further search for documents responsive to the Appellant's request.

I. Background

On June 12, 2009, the Appellant requested "copies of any and all documents related to the use of radionuclides (radioisotopes) in any instrumentation package sent into space." Request Letter dated June 12, 2009, from Appellant to Director, FOIA/PA Division, DOE. On July 1, 2009, the Office of Information Resources transferred the request to the Office of Nuclear Energy (NE). E-mail dated September 16, 2009, at Attachment 1, from Alexander Morris, FOIA Officer, to Janet Fishman, Office of Hearings and Appeals (OHA), DOE. On August 25, 2009, Idaho, on behalf of NE, responded to the Appellant's request, stating that neither Idaho nor NE had located responsive documents, but that a cursory search of the Office of Scientific and Technical Information website yielded seven public documents that may be responsive to the request. Determination Letter dated August 4, 2009, from Clayton Ogilvie, Idaho, to Appellant. On September 9, 2009, the Appellant appealed, claiming that it stretches "credulity to believe that DOE has no documents under its control or has no documents that would suggest where records may exist that would document its preparation of radioisotopes for space applications." Appeal Letter dated August 28, 2009, from Appellant, to Director, Office of Hearings and Appeals (OHA), DOE (Appeal Letter).

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must “conduct a search reasonably calculated to uncover all relevant documents.” *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). “The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials.” *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).^{1/}

We contacted Idaho to evaluate its search. Idaho indicated that a search had been conducted of the NE and Idaho offices most likely to contain documents responsive to the Appellant’s request. E-mail dated September 14, 2009, from Clayton Ogilvie to Janet Fishman. A search was performed of the Idaho’s Electronic Document Management System using a variety of key words including “Apollo Mission” and “plutonium.” *Id.* NE also performed a search but was asked to repeat it because someone at Idaho recalled that documents were in an office belonging to a recently retired person. *Id.* No responsive documents were discovered by either search. We believe the searches that Idaho and NE conducted were reasonably calculated to uncover the requested information in those areas of Idaho and NE most likely to have the information.^{2/} Accordingly, this Appeal will be denied.

^{1/} All OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://www.oha.doe.gov/foia1.asp>.

^{2/} On May 8, 2009, the Appellant filed another request, similar to the one under consideration in this Appeal. The May 8, 2009, request was forwarded to the Office of History and Heritage Resources (HHR) for review. HHR has identified responsive documents but has not issued a determination. Accordingly, the May 8, 2009, request is not ripe for review by the OHA. E-mails dated September 16, 2009, from Alexander Morris, FOIA Officer, DOE, to Janet Fishman.

Also, Idaho did indicate in its determination letter that it searched the Office of Scientific and Technical Information public website at www.osti.gov/bridge, using the key words “Apollo Mission” and “Plutonium.” Seven documents responsive to those key words were located. Since those documents are publicly available, Idaho’s notification to the Appellant as to how to access the documents is sufficient under the FOIA.

It Is Therefore Ordered That:

- (1) The Appeal filed by Scott Wenger, Case No. TFA-0328, is hereby denied.
- (2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: September 23, 2009